A

Public Prosecutor v Muhammad Kasyfullah bin Kassim

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05(H)-190–05 OF 2016
AHMADI ASNAWI, VERNON ONG AND ZAMANI A RAHIM JJCA
4 OCTOBER 2016

C

Criminal Procedure — Appeal — Appeal against sentence — Respondent sentenced to five years imprisonment for offence of giving support to commission of terrorist act involving use of firearms under s 130J(1)(b) of the Penal Code — Appellant dissatisfied with inadequacy of sentence — Whether discount should be given based on plea of guilty — Whether public interest shall be given priority — Whether deterrent sentence should be ordered — Penal Code s 130J(1)(b)

D

The respondent was convicted for the offence of giving support to the commission of a terrorist act involving the use of firearms under s 130J(1)(b) of the Penal Code and was sentenced to five years imprisonment by the trial judge. In sentencing the respondent to five years imprisonment, the trial judge took into consideration the circumstances of the case and the mitigating factors. The learned trial judge also took into consideration that the respondent was a youthful offender and first offender; and that the respondent had never pledged allegiance to the terrorist group, Islamic State ('IS'). Further, the learned trial judge relied on the case of *Pendakwa Raya lwn Ummi Kalsom bt Bahak* [2016] 6 MLJ 407 ('*Ummi Kalsom*'s case') and ordered discount on the sentence based on the guilty plea by the respondent. The appellant was dissatisfied with the inadequacy of sentence imposed by the learned trial judge, hence this appeal. The appellant prayed for deterrent sentence and submitted that public interest was important and shall be given priority.

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Held, setting aside the sentence of five years imprisonment imposed by the High Court and substituting it with an imprisonment of 12 years with effect from the date of arrest:

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(1) The background facts in the respondent's case was that he was at least a former IS 'fighter and combatant', whereas in *Ummi Kalsom*'s case, the offence was giving support to the commission of a terrorist act. There could not be any comparison between *Ummi Kalsom*'s case and the respondent's case as they were distinguishable and different like chalk and cheese. The conduct of the respondent in supporting the IS group was a very serious criminal offence. It should reflect the public abhorrence against such crime and warrant a severe punishment. Based on the facts and circumstances of the case as well as the public interest factor, discount

I

on the plea of guilty should not be extended to the respondent (see paras 22 & 30–31).

[Bahasa Malaysia summary

Responden disabitkan untuk kesalahan memberi sokongan kepada perlakuan perbuatan pengganas melibatkan penggunaan senjata api di bawah s 130J(1)(b) Kanun Keseksaan dan dijatuhkan hukuman penjara lima tahun oleh hakim perbicaraan. Dalam menghukum responden kepada penjara lima tahun, hakim perbicaraan mengambil kira keadaan kes dan faktor-faktor pengurangan. Hakim perbicaraan juga mengambil kira bahawa responden adalah pesalah muda dan pesalah pertama; dan bahawa responden tidak pernah mengaku setia dengan kumpulan pengganas, Islamic State ('IS'). Selanjutnya, hakim perbicaraan yang bijaksana bergantung ke atas kes *Pendakwa Raya lwn Ummi Kalsom bt Bahak* [2016] 6 MLJ 407 ('kes *Ummi Kalsom*') dan memerintahkan diskaun atas hukuman berdasarkan pengakuan bersalah responden. Perayu tidak berpuas hati dengan hukuman yang tidak mencukupi yang dikenakan oleh hakim perbicaraan yang bijaksana, maka rayuan ini. Perayu memohon untuk hukuman berat dan berhujah bahawa kepentingan awam adalah penting dan akan diberikan keutamaan.

Diputuskan, mengetepikan hukuman penjara lima tahun yang dikenakan oleh Mahkamah Tinggi dan menggantikannya dengan penjara 12 tahun berkuat kuasa dari tarikh tangkapan:

(1) Fakta latar belakang kes responden adalah bahawa dia sekurang-kurangnya bekas IS 'fighter and combatant', sebaliknya dalam kes *Ummi Kalsom*, kesalahan adalah memberi sokongan kepada pelakuan perbuatan pengganas. Tidak terdapat apa-apa perbandingan di antara kes *Ummi Kalsom* dan kes responden kerana ia boleh dibezakan dan berlainan. Perbuatan responden dalam menyokong kumpulan IS adalah kesalahan jenayah serius. Ia patut membayangkan kebencian awam terhadap jenayah sedemikian dan mewajarkan hukuman berat. Berdasarkan atas fakta dan keadaan kes dan juga faktor kepentingan awam, diskaun atas pengakuan bersalah tidak patut dilanjutkan kepada responden (lihat perenggan 22 & 30–31).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 425–485.

Cases referred to

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Ganesan a/l Nachiappan & Ors v PP [2000] 3 MLJ 244; [2000] 3 CLJ 302, FC (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)

Pendakwa Raya v Abdul Halim bin Ishak & Anor [2013] MLJU 821; [2013] 9 CLJ 559, CA (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mohd Anwar bin Azmi & 4 lagi (Criminal Appeal No 45–50–46–16 of 2015) (unreported), CA (refd)
PP v Mohd Fazelan bin Md Khuzeh [2015] 6 MLJ 688, CA (refd)
PP v Muamar Gadaffi bin Mohamad Shafawi (Criminal Appeal No W-05(H)-87–02 of 2016) (unreported), CA (refd)
PP v Nazarudin bin Ahmad & Ors [1993] 2 MLJ 9, HC (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45, HC (refd)
PP v Rohaimi bin Abd Rahim & 1 lagi (Criminal Appeal No W-05(H)-83–02 of 2016) (unreported), CA (refd)
Pendakwa Raya lwn Ummi Kalsom bt Bahak [2016] 6 MLJ 407; [2015] 7 CLJ 503, HC (distd)
R v Ball (1951) 35 Cr App Rep 164, CA (refd)
R v Costen (1989) 11 Cr App Rep (S) 18, CA (refd)
R v Ipeelee [2012] 1 SCR 433, SC (refd)
R v Sargeant (1974) 60 Cr App Rep 74, CA (refd)
Yusmarin bin Samsuddin v PP [1999] 4 MLJ 625; [1999] 4 CLJ 391, CA (refd)

Legislation referred to

Penal Code ss 34, 109, 130F, 130G(c), 130J(1)(a), (1)(b), 130P, 511

Appeal from: Criminal Trial No 45(SO)-13–02 of 2015 (High Court, Kuala Lumpur)

Nurshafini bt Mustafha (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Azizzul Shariman bin Mat Yusoff (Azizzul & Ariff) for the respondent.

Zamani A Rahim JCA:

INTRODUCTION

[1] The respondent was charged with two counts of offences in the alternative, firstly, by giving support to the terrorist group, Islamic State ('IS') and secondly, by giving support to the commission of a terrorist act involving the use of firearms, the offences under s 130J(1)(a) and 130J(1)(b) of the Penal Code respectively. The charges read as follows:

> The Principal Charge
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> Bahawa kamu antara 28.12.2013 hingga 7 April 2014 dengan pengetahuan, telah memasuki Syria dengan menaiki pesawat melalui Lapangan Terbang Antarabangsa

Kuala Lumpur di dalam Daerah Sepang, dalam Negeri Selangor, memberi sokongan kepada kumpulan pengganas Islamic State dengan menjadi ahli kepada kumpulan Islamic State tersebut. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 130J(1)(a) Kanun Keseksaan dan boleh dihukum di bawah seksyen 130J Akta yang sama.

The Alternative Charge

Bahawa kamu antara 28.12.2013 hingga 7 April 2014 dengan pengetahuan, telah memasuki Syria dengan menaiki pesawat melalui Lapangan Terbang Antarabangsa Kuala Lumpur di dalam Daerah Sepang, dalam Negeri Selangor, memberi sokongan kepada berlakunya perbuatan pengganas yang melibatkan penggunaan senjata api dan perbuatan itu dilakukan dengan niat untuk melanjutkan suatu perjuangan ideologi dan perbuatan tersebut boleh semunasabahnya dianggap sebagai diniatkan untuk mengugut orang awam di Syria. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 130J(1)(b) Kanun Keseksaan dan boleh dihukum di bawah seksyen 130J Akta yang sama.

Hukuman

Sekiranya disabitkan dengan kesalahan, hendaklah dihukum penjara seumur hidup atau penjara selama tempoh tidak melebihi 30 tahun, atau denda, dan boleh dirampas mana-mana harta yang telah digunakan atau diniat untuk digunakan bagi melakukan kesalahan itu.

STATEMENT OF FACTS AND SENTENCE

[2] The respondent pleaded guilty to the alternative charge. The statement of facts was tendered. It is reproduce below:

Facts of case

(1) Keterangan menunjukkan bahawa pada 28 Disember 2013 tertuduh telah berlepas dari Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA) ke Istanbul, Turki. Tertuduh kemudian telah memasuki Syria melalui Turki dan telah berada disana sehingga kembali semula ke Malaysia pada 7 April 2014 melalui KLIA.

(2) Tertuduh telah berlepas ke Syria melalui Turki bersama rakan-rakannya warganegara Malaysia iaitu Mohamad Fauzi bin Misrak (juga dikenali sebagai Abu Dayan), Mohamad Naim bin Abd Rashid (juga dikenali sebagai Abu Naim) dan Aqif Heusen bin Rahizat (juga dikenali sebagai Abu Suffian). Setelah sampai di Turki, tertuduh dan 3 rakannya Mohamad Fauzi bin Misrak (Abu Dayan), Mohamad Naim bin Abd Rashid (Abu Naim) dan Aqif Heusen bin Rahizat (Abu Suffian) kemudiannya telah melalui jalan darat untuk memasuki Syria.

(3) Sebelum berlepas ke Syria, tertuduh telah menjual sebidang tanah kepada abang iparnya yang bernama Ahmad bin Abdullah dengan nilai sebanyak RM10,000 pada 24 Disember 2013. Tertuduh kemudian telah menerima wang secara tunai sebanyak RM5,000 yang telah digunakan untuk membiayai perjalanan beliau ke Syria. Baki wang

penjualan tanah tersebut kemudian cuma diberikan pada awal April 2015.

(4) Keterangan juga menunjukkan bahawa tertuduh telah meminta pertolongan rakannya yang berada di Malaysia iaitu penama Hazini bin Hamid untuk memasukkan wang pemberian Ahmad bin Abdullah ke dalam akaun penama A'aidah binti Saiddudin sebanyak RM2,700 dan RM1,000 pada 5 April 2016. Wang sebanyak RM3,700 tersebut telah digunakan oleh tertuduh untuk membiayai tiket dan kos perjalanan balik ke Malaysia melalui Turki oleh tertuduh dengan menggunakan penerbangan Malaysia Airlines.

(5) Keterangan juga menunjukkan bahawa tertuduh telah memberi sokongan dan telah memainkan peranan serta bernaung didalam kumpulan pengganas Islamic State (IS) semasa berada di Syria. Walau bagaimanapun, tertuduh tidak berbaiah kepada kumpulan IS tersebut.

(6) Selain itu, tertuduh dan rakan-rakannya juga telah melakukan Ribat iaitu Sentri bagi menjaga kawasan rumah penginapan para mujahidin. Tertuduh juga dibekalkan dengan senjata api yang dibekalkan oleh IS iaitu jenis AK-47.

(7) Semasa berada di Syria, tertuduh juga telah menjalani latihan ketenteraan bersama-sama rakannya yang merupakan warganegara Malaysia iaitu Mohamed Naim bin Abd Rashid. Tertuduh juga telah memberitahu rakan-rakannya yang bernama Hazini bin Hamid dan Muhammad Annuar bin Man bahawa beliau menyertai peperangan semasa berada di Syria dan pernah melepaskan tembakan.

(8) Tertuduh juga telah memberitahu dan memuatnaik gambar-gambar semasa beliau berada di Syria antara 28 Disember 2013 sehingga 7 April 2014 di dalam akaun laman sosial 'Facebook' milik beliau yang bernama 'Oltimet Wo Rio' dan didaftarkan di dalam pengkalan data Facebook sebagai 'oltimet rio'.

(9) Sementara berada di Syria, tertuduh juga sering berhubungan dengan rakannya yang bernama Muhammad Annuar bin Man melalui aplikasi 'whatsapp' semasa berada di Syria. Didalam perbualan tersebut, tertuduh telah memaklumkan bahawa beliau telah dibekalkan dengan senjata api semasa berada di Syria. Tertuduh juga berkongsi gambar dengan Muhammad Annuar bin Man melalui aplikasi 'whatsapp' tersebut. Tertuduh juga telah memberitahu penama Hazini bin Hamid bahawa beliau telah menyertai beberapa siri peperangan melibatkan penggunaan senjata api untuk menentang pemerintahan Rejim Bashar Al Assad semasa berada di Syria.

(10) Berdasarkan kepada keterangan yang ada, tertuduh telah melakukan kesalahan memberikan sokongan kepada Kumpulan Pengganas Islamic State dengan cara bernaung di bawah kumpulan pengganas tersebut walaupun tidak berbaiah kepada kumpulan tersebut. Keterangan juga menunjukkan bahawa tertuduh telah memberikan sokongan kepada berlakunya perbuatan pengganas yang melibatkan

penggunaan senjata api. Perbuatan tersebut telah dilakukan dengan niat untuk melanjutkan suatu perjuangan ideologi yang semunasabahnya dianggap sebagai diniatkan untuk mengugut orang awam di Syria. Oleh yang demikian, tertuduh telah melakukan suatu kesalahan di bawah seksyen 130J(1)(b) Kanun Keseksaan yang boleh dihukum di bawah seksyen peruntukan yang sama.

[3] The statement of facts was marked as exh P4. The learned deputy then tendered the following documentary evidence namely:

List of exhibits

(1) Borang senarai G geledah (2 senarai):	
(a)SenaraiGeledah—BandarBaharu1257/14	P5
(b) Senarai Geledah — THSL/019647/14	P6
(2) Gambar tempat kejadian — (64 keping)	P7(1)–(64)
(3) Sijil Seksyen 90A Akta Keterangan	P8
(4) Gambar Passport (5 keping)	P9(1)–(5
(5) Sijil Seksyen 90A Akta Keterangan	P10
(6) Rekod Pergerakan. Rekod Keluar Masuk	P11(1)–(4)
(7) Penyata A/C Akaun Ai'dah bt Saiduddi	P12(1)–(15)
(8) Maklumat Akaun Facebook:	
(a) Certificate Relating to Foreign Evidence	P13
(b) Form 2 MACA (3 copies)	P14(a)(b)(c)
(c) CD — Islamic St MLAT (8/12/2015)	P15
(9) Laporan MCMC	P16
(10) Pen Drive DF2014-DEC-04–12. Secret TD01	P17
(11) Laporan Polis — THSL/019647/14	P18
(12) Laporan Tangkap — Serdang (KH)/3230/14	P19
(13) Laporan Pembetulan — Bandar Baru 1256/14 P20	
(14) Laporan Rampasan Barang Kes — Bandar Baru 1257/14	P21
(15) Bandar Baru Report 1258/14	P22
(16) Salinan Pasport No A 30934402	P23

[4] Having accepted the respondent's plea of guilty, he was convicted under the alternative charge of giving support to the commission of a terrorist act under s 130J(1)(b) of the Penal Code which carries a mandatory term of imprisonment for life or imprisonment for a term not exceeding 30 years or with fine, and shall also be liable to forfeiture of any property used or intended to be used in connection with the commission of the offence.

MITIGATION

[5] Thereafter learned counsel for the respondent advanced his mitigation and followed by the rebuttal by the learned deputy:

(1) 38 tahun;

(2) semasa ditangkap — 36 tahun;

(3) kerja — Tukang rumah, RM90–RM100 sehari;

(4) belum kahwin;

(5) anak ke 9 daripada 10 beradik;

(6) both parents — meninggal dunia;

(7) SPM — pelajaran;

(8) OKT ditangkap pada 27/11/2014 (3 bulan selepas balik ke Malaysia daripada Syria);

(9) faktor PG before trial;

(10) menjimat masa mahkamah;

(11) jika bicara, masa yang panjang;

(12) jimat kos saksi;

(13) pesalah pertama;

(14) tiada kesalahan jenayah;

(15) pohon peluang diberikan kepada OKT supaya lebih berhati- hati;

(16) masa depan untuk baiki;

(17) OKT kesal dan insaf;

(18) terpengaruh dengan rakan-rakan;

(19) mendapati perjuangan menyimpang daripada garis Islam — balik serta merta;

(20) tidak pernah berbaiah (bersumpah) dengan IS, menunjukkan OKT lebih berhati-hati. Setelah menyedari kesilapan itu, OKT balik ke Malaysia OKT tidak bergiat lagi dengan IS;

(21) pohon hukuman ringan, OKT tak bunuh sesiapa;

(22) tiada hukuman penjara, had penjara minimum;

(23) rakan-rakan OKT yang PG di bawah seksyen yang sama yang pergi bersama OKT ke Syria telah PG — 4 1/2 tahun bermula daripada tarikh tangkap; dan

(24) penjara mula tarikh tangkap (27/11/2014).

Rebuttal by learned deputy:

1) fakta kes;

2) serius — 30 tahun;

3) kesalahan keselamatan;
4) OKT akui berada di Syria;
5) jalani latihan ketenteraan;
6) jidak berbaiah — bantu perang mujahidin;
7) dibekalkan dengan senjata;
8) menyertai kumpulan yang salah;
9) menyertai peperangan; dan
10) pohon hukuman berat.

[6] Having considered the mitigation, the rebuttal by learned deputy and the surrounding circumstances of the case, the trial judge sentenced the respondent to five years imprisonment commencing from the date of arrest on 27 November 2014.

[7] No appeal was filed by the respondent on the sentence imposed on him. However, the appellant (prosecution) was dissatisfied with the adequacy of the sentence and filed an appeal to this court. Upon hearing the appeal on 10 August 2016, we set aside the trial judge's sentence of five years imprisonment and in its place, we substituted it with 12 years imprisonment with effect from the date of arrest on 27 November 2014.

TWO NOTICES OF APPEAL TO THE FEDERAL COURT

[8] The respondent was aggrieved by the enhancement of his sentence. The respondent himself, through the prison authority, on 19 August 2016 filed an appeal not only on *sentence*, but also on *conviction*, despite having unequivocally pleaded guilty to the charge.

[9] About four days later, the respondent's learned counsel filed another notice of appeal on 23 August 2016. This time the appeal was directed at the *sentence* only.

[10] The *conviction* of the respondent was never appealed against and canvassed before us. The appeal before us was solely by the prosecution and it was only on *sentence*. As the respondent has pleaded guilty and had been convicted on that plea, 'there shall be no appeal except as to the extent or legality of the sentence': see s 305 of the Criminal Procedure Code. That being the case, we propose to deal with the issue of sentence only in this judgment.

THE DECISION OF THE HIGH COURT

[11] In imposing the sentence as he did, the trial judge had appreciated and addressed himself on the general principles of sentencing. Several case laws were cited and referred to namely, *R v Sargeant* (1974) 60 Cr App Rep 74, *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315, *R v Ball* (1951) 35 Cr App Rep 164, *R v Ipeelee* [2012] 1 SCR 433, *Yusmarin bin Samsuddin v Public Prosecutor* [1999] 4 MLJ 625; [1999] 4 CLJ 391, *Pendakwa Raya v Abdul Halim bin Ishak & Anor* [2013] MLJU 821; [2013] 9 CLJ 559 and *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256.

[12] In sentencing the respondent to five years imprisonment, the trial judge took into consideration the circumstances of the case and the mitigating factors advanced on behalf on the respondent. The trial judge wrote in his judgment at pp 33–34, paras 26–27 of *RR, Jld 1* as follows:

> 26. Dalam menentukan tempoh pemenjaraan yang bersesuaian terhadap tertuduh, Mahkamah ini juga telah mengambilkira fakta serta keadaan yang berlaku dalama kes ini serta faktor-faktor mitigasi yang memihak kepada tertuduh. Sungguhpun keterangan menunjukkan bahawa tertuduh telah memberikan sokongan dan telah memainkan peranan serta bernaung didalam kumpulan pengganas Islamic State semasa berada di Syria, *tetapi tertuduh sendiri tidak pernah berbaiah (bersumpah) kepada kumpulan Islamic State* tersebut. Keadaan ini jelas menunjukkan bahawa tertuduh lebih berhati-hati dan setelah menyedari kesilapan yang dilakukan itu serta penglibatannya yang selama ini hanyalah suatu penganiayaan dan sia-sia, maka *tertuduh telah membuat keputusan untuk pulang segera ke Malaysia dan tidak lagi bergiat dengan kumpulan Islamic State*. Walaupun terdapat satu perancangan yang rapi, ianya tidak dilakukan oleh tertuduh sendiri tetapi telah diatur sedemikian rupa oleh pihak rakan-rakannya iaitu Mohamad Fauzi bin Misrak (dikenali sebagai Abu Dayyan), Mohamad Na'im bin Abd. Rashid (dikenali sebagai Abu Naim) dan Aqif Heusen bin Rahizat (dikenali sebagai Abu Suffian). Mahkamah ini akur bahawa melalui fakta-fakta kes, tertuduh juga menjalani latihan ketenteraan bersama-sama rakannya semasa berada di Syria. Tertuduh juga dikatakan telah menyertai peperangan semasa berada di Syria dan melepaskan tembakan, tetapi mahkamah ini tiada mendapati apa-apa fakta yang menjuruskan kepada perbuatan dan kesalahan yang dilakukan oleh tertuduh itu mempengaruhi mana-mana pihak di negara ini untuk menyertai perjuangan di Syria.
>
> 27. *Mahkamah juga mengambil kira bahawa rakan-rakannya yang bersama-sama dengannya juga telah dituduh di lain-lain mahkamah atas kesalahan yang sama dan membuat pengakuan bersalah. Yang Arif Hakim telah menjatuhkan hukuman empat tahun setengah daripada tarikh tangkap.* Mahkamah ini turut mengambil kira kes Mahkamah Agong *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; [1987] CLJ Rep 209:
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> > in assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering firstly, the gravity of the type of offence committed, secondly, the facts in the commission of the offence, thirdly, the

> presence or absence of mitigating factors and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentence in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. (Emphasis added.)

[13] On the respondent's antecedent, the trial judge may be correct to say that the respondent was a first offender (*pesalah pertama*), but certainly His Lordship was incorrect to say that the respondent was a youthful offender (*pesalah muda*) as he was about 30 years old at the time of the commission of the offence. Based on the said incorrect premise, the trial judge opined that a longer imprisonment term was not suitable and good for the society and public interest. His Lordship was of the view that the public interest was better served if the respondent was *not* sent to a long period of incarceration. A shorter term of imprisonment had achieved its purpose to rehabilitate the respondent and for the good of the public at large. His Lordship at pp 36–37 para 30 wrote as follows:

> Saya berpandangan bahawa kepentingan awam lebih terjaga dan terpelihara sekiranya tertuduh tidak dipenjarakan untuk suatu tempoh yang terlalu lama. Tempoh pemenjaraan yang singkat, pada hemat saya telah mencapai matlamat memberi pengajaran serta pemulihan kepada masyarakat umum dan juga tertuduh.

[14] The general rule is that any unfair and unjust sentences amongst two or more accused persons should be avoided. The sentences amongst co-accused must ordinarily be the same. However, there are cases where disparity of sentences are readily recognised by our criminal courts: see *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45 and *Public Prosecutor v Nazarudin bin Ahmad & Ors* [1993] 2 MLJ 9. A range of sentences imposed may depend on a number of considerations, inter alia, the differences in their mitigation, the role played by each of the accused persons and the degrees of culpability, their antecedents etc. The following principles are stated by *Thomas* in *Archbold* 1993:

> Where two or more offenders are to be sentenced for participation in the same offence, the sentences passed on them should be the same, unless there is a relevant difference in their responsibility for the offence or their personal circumstances. If there are reasons for imposing a particular form of sentence … on one which does not apply to the other, it is not necessarily wrong to make such an order in respect of one and impose a sentence of imprisonment on other: (Para 5-169).

[15] In assessing the length of the custodial sentence (excluding imprisonment for life) imposed on the respondent, the trial judge had taken into account the length of the imprisonment term meted out by other criminal

courts on the respondent's colleagues who pleaded guilty on charges of similar offences. The sentence passed was four years each from the date of arrest. We do not agree with the trial judge. On our part, we recognised that firstly, there can be disparity of sentences amongst co-accused persons, depending on their responsibility for the crime and their personal circumstances: see *Ravindran & Ors*, and *Nazarudin bin Ahmad & Ors*. Secondly, the role played by the respondent was disclosed in the statement of facts, exh P4, whilst the roles of the respondent colleagues and their antecedents were not disclosed and canvassed before us.

[16] Finally, the trial judge was persuaded with learned counsel's submission where His Lordship was referred to the judgment of *Kamardin Hashim J* (as he then was) in *Pendakwa Raya lwn Ummi Kalsom bt Bahak* [2016] 6 MLJ 407; [2015] 7 CLJ 503 where the accused pleaded guilty to a charge under s 130J(1)(a) of the Penal Code, read with s 511 of the same where she was sentenced to two years jail. On appeal to the Federal Court, the sentence was affirmed. The factual circumstances in *Ummi Kalsom Bahak*'s case and its mitigating factors taken into account by the trial judge are produced below:

> Kesalahan yang telah dilakukan oleh tertuduh adalah satu jenayah yang masih belum muktamad. Walaupun terdapat satu perancangan yang rapi, ianya tidak dilakukan oleh tertuduh sendiri, tetapi telah diatur sedemikian rupa oleh pihak Afiq Huesen bin Rahizat. Selain itu latar belakang keluarga tertuduh telah mendorong beliau untuk berkahwin dengan penama tersebut dan telah terpengaruh dengan dakyah kumpulan IS. Tertuduh telah mengalami kegagalan dalam pelajaran di peringkat universiti dan tidak mendapat kasih sayang ibunya yang telah meninggal dunia lebih awal menyebabkan tertuduh mudah terpengaruh. Umur tertuduh yang masih muda (25 tahun masa kejadian) menyebabkan tertuduh tidak begitu matang serta berfikiran suntuk untuk memikirkan akibat daripada perbuatannya.

THE APPEAL

[17] In this appeal, learned deputy canvassed several grounds of appeal in her oral and written submission before us. In praying for a deterrent sentence, learned deputy submitted as follows:

(1)(i) hukuman yang dijatuhkan Mahkamah perlulah mencerminkan keseriusan masalah penularan kegiatan keganasan;

(ii) usaha memerangi keganasan perlu seiring dengan usaha agensi-agensi lain di Malaysia;

(iii) seharusnya tidak wujud rangkaian keganasan di Malaysia; dan

(iv) isu keganasan adalah masalah global. Ia bukan satu isu yang terasing.

(2) the public interest is important and shall be given priority: see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256;

(3) the trial judge appeared to have taken the respondent's personal interest more than the public interest. This is reflected in His Lordship judgment at para 30;

(4) the respondent was actively trained in Syria on IS militancy or *jihad* and propagated the ideology on the social Facebook:

(a) menjalani latihan ketenteraan bersama rakan-rakannya yang lain;

(b) menyertai beberapa siri peperangan semasa berada di Syria dan pernah melepaskan tembakan; dan

(c) memuat naik gambar-gambar semasa responden berada di Syria antara 28 Disember 2013–7 April 2014 dalam akaun laman social Facebook;

(5) the terrorist activities had happened on our own backyard when the Movida club in Puchong, Selangor was attacked with the hand grenade on the wee hours on 28 June 2016. Several members of the public were injured. Before that, the militant IS attacked in the centre of Jakarta on 14 January 2016 where eight lives were loss (including four bombers suicide) and injured 23 civilians. If the terrorist acts are not snip during its embryonic stage, it will definitely cause a serious threat to the peace and security of this country. Recently, there were a number of arrest of IS militants and supporters across the country before they could attack the places where the members of public gathered and assembled. One of such a plot was to launch attacks during our recent Merdeka-eve celebrations. Fortunately at the moment the intelligence services of the Counter Terrorism Unit of the Royal Malaysian Police Force are on top of the situation; and

(6) the respondent had participated in the war in Syria using firearms — contributed to the carnage and turmoil and placed public lives in chaos.

[18] We are aware that the power of sentencing given to a trial court is discretionary and in order to disturb the sentence imposed an appellate court must be convinced that the trial judge had erred in applying the correct principles of sentencing or had embarked on some unauthorised or extraneous exercise of discretion: see *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 and *Ganesan a/l Nachiappan & Ors v Public Prosecutor* [2000] 3 MLJ 244; [2000] 3 CLJ 302.

[19] On pleading guilty an accused is normally given credit or discount between one quarter and one third of what otherwise would have been the sentence: see *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167. In this case, it would appear that the trial judge had exercised his discretion to grant the discount to the respondent, though the percentage of the discount was not indicated. However, not in every case of pleading guilty, the accused is entitled as a rule of thumb to an automatic reduction of sentence. In the case of *R v Costen* (1989) 11 Cr App Rep (S) 18, Lord Lane CJ said as

follows:

> But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence should be passed in order to protect the public, in those circumstances a plea of guilty may not result in any discount.

[20] The gist of the charge against the respondent is his involvement in the jihadist, militant movement of the IS. Its movement has been characterised by extreme violence and suicide bombings. It is a menace to the international community and its threat and extremist religiousideologies is no exception to Malaysia, which has a population of about 31m, and 60 percent are Muslims. It is believed that there are about 200–250 IS fighters from Malaysia in the Middle East such Syria, Iraq and Turkey. One of the IS militant leaders based in Syria is a young Malaysian, Muhammad Wanndy Mohamed Jedi. He was responsible to orchestrate and direct the attacks in Malaysia. According to an article entitled 'Malaysia: Clear and present danger from the Islamic State' by James Chin — Wednesday, 16 December 16 2015, there was a meeting between the militant groups of the IS, Abu Sayyaf and the Moro National Liberation Front (MNLF) in Sulu. At the meeting, several resolutions were passed, including the attacks in Malaysia, in particular Kuala Lumpur and Sabah. This chilling information shocked us and foreigners living in Malaysia. Indeed the first attack by the militant in Malaysia was the grenade attack at the Movida club in Puchong, Selangor on 28 June 2016. In this early hours attack, it targeted the members of the public who watched Euro football 2016. We are mindful that the charge against the respondent was between the years 2013 to 2014. The IS militant attack is serious and real. The threat by the IS militant in this country was never appreciated and considered by the trial judge. His Lordship was satisfied that the respondent had ceased his ties with the IS, he felt remorse and promptly returned to Malaysia. He was arrested a few months later after returning from Syria, by then his was 'stale' or a spent force, so to speak. In other word, he was a reformed IS militant. That may be so, but we must bear in mind that the IS militants are fighting a religious war. They are die-hard fighters who are extremely difficult to deradicalise as the English idiom says 'a leopard does not change its spots'.

[21] The trial judge was content to emphasise on the case of *Ummi Kalsom Bahak*. The brief facts are these. She was apprehended at the Immigration counter at KLIA2 enroute to Brunei, Istanbul and Syria to marry an IS militant, Muhammad Aqif. She was also charged with an offence under s 130J(1)(a) of the Penal Code, read with an offence of attempt to commit an offence under s 511 of the same Code. For an offence of attempt to commit an offence, 'any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence', in which case, the longest term would be

15 years imprisonment. *Kamardin Hashim J* (as he then was) correctly recognised this. His Lordship expressed as follows:

> Walau bagaimanapun, bagi pertuduhan pilihan yang mana tertuduh telah disabitkan, seksyen 511 Kanun Keseksaan menetapkan hukuman maksima bagi kesalahan cubaan (attempt) adalah separuh daripada hukuman maksima yang telah diperuntukan bagi kesalahan itu. Dalam kes terhadap tertuduh disini, tertuduh boleh dihukum penjara maksima *15 tahun* atau dihukum denda dan harta benda yang berkaitan boleh dirampas. Walaupun hukuman bagi kesalahan yang telah dilakukan oleh tertuduh tidak menetapkan hukuman pemenjaraan secara mandatory, namun memandangkan keseriusan kesalahan berkaitan dengan unsur keganasan, adalah wajar hukuman pemenjaraan dikenakan bagi memberikan tauladan kepada masyarakat umum supaya menjauhi kesalahan seumpama ini. Kepentingan awam hendaklah diberikan keutamaan dalam menghadapi kesalahan yang melibatkan keganasan tanpa mengira keganasan tersebut berlaku di dalam negara mahupun di luar negara. Kepentingan awam hendaklah dalam keadaan kes ini sentiasa mengatasi kepentingan seseorang tertuduh.

[22] In imposing the sentence of five years imprisonment on the respondent, the trial judge was persuaded and influenced by a lenient sentence passed on *Ummi Kalsom Bahak*. The maximum term imposable on the respondent is 30 years, whilst the maximum term applicable to *Ummi Kalsom Bahak* is 15 years: see the discussion in para 21 above. The factual matrix in the case of *Ummi Kalsom Bahak*, cannot be used as a barometer to gauge for the imposition of a proper custodial sentence on the respondent. The background facts in the respondent's case is that he was at least a former IS 'fighter and combatant', whereas in *Ummi Kalsom Bahak*'s case, the offence was giving support to the commission of a terrorist act. The offence of giving support to terrorism is yet to be completed — an inchoate offence. She was arrested at KLIA2, Sepang before stepping her foot in Syria where she intended to marry her lover, an IS militant, Muhammad Aqif. She did not receive an army training and did not participate in the battle using firearms. Neither was there evidence to show that she had the knowhow to handle weaponry. That being the case, we do not agree that the case of *Ummi Kalsom Bahak* is a persuasive authority on sentence against the respondent. There cannot be any comparison between *Ummi Kalsom Bahak*'s case and the respondent's case as they are distinguishable and different like chalk and cheese.

[23] The trial judge also erred when His Lordship was of the view that the prosecution will face a very difficult task to collect the evidence from Syria and Istanbul to prove the charge against the respondent in the event of a full trial (p 36 at para 29 of *RR, Jld 1*). A similar view was adopted by the trial judge in the Court of Appeal case of *Public Prosecutor v Mohd Fazelan bin Md Khuzeh* [2015] 6 MLJ 688. This court said that such proposition by the High Court judge was 'a pure conjecture and unwarranted'.

[24] Though the respondent herein did not formalise or sworn (*berbaiah*) his allegiance with the terrorist group IS, but he was willing to fork out his own money to go to Syria. While in Syria for about three months, together with his comrades, he attended an army training and participated in series of battles using firearms against President Bashar Al-Assad's regime. He also performed sentry duty at the housing area of the jihadists.

[25] The respondent was also actively involved on social media application using the name of 'Oltimet Wo Rio' by downloading his pictures to inspire and entice new supporters or sympathisers. The respondent too in his 'whatsapp' application liased with his fellow Malaysian friends, Muhammad Anuar bin Man and Hazini bin Hamid, sharing his pictures and information on the IS activities in Syria between December 28, 2013 and April 7, 2014.

[26] It has been accepted that the sentence passed must take into account the public interest factor. All the more so when the crime involved violence and horrific acts of cruelty by IS militant. This must be the number one factor to be placed in the mind of the sentencing court. The sentence imposed must not only served as a deterrence to the respondent but also to deter others from joining or supporting the IS terrorist acts or suicide bombings and terrorism. An often cited case of public interest factor was the decision of *Hilbery J* in *R v Ball* (1951) 35 Cr App Rep 164 where His Lordship had expressed his views as follows:

> The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living.

[27] We now propose to examine the sentences meted out by our court in relation to offences under the Penal Code under Chapter VIA — 'Offences Relating to Terrorism' to determine the trend of sentencing policy. In *Public Prosecutor v Muamar Gadaffi bin Mohamad Shafawi* (Court of Appeal Criminal Appeal No W-05(H)-87–02 of 2016), the offence was under s 130F of the Penal Code. The accused opened an account with the social Facebook in the name of 'Iskandar Dzulqarnain IS' on 16 May 2012. Its purpose was to propagate militant IS ideology to friends on the social website. The accused also opened a second account on the Facebook in the name of 'Ammar Rasuli Al-Zihadi' for the same purpose. Upon pleading guilty, the High Court judge sentenced the accused to *five years imprisonment*. On appeal, on 25 April 2016,

this court allowed the prosecutor's appeal and set aside the sentence imposed by the High Court. *The accused was sentenced to 15 years imprisonment from the date of arrest*.

[28] In *Public Prosecutor v Rohaimi bin Abd Rahim & 1 lagi* (Court of Appeal Criminal Appeal No W-05(H)-83–02 of 2016), the accused was charged with an offence under s 130G(c) of the Penal Code against the first respondent. Whilst the second respondent was charged for abetment under s 109 of the Penal Code read with s 130G(c) of the same Code. Both the first and second respondents were also charged under s 130P of the Penal Code, read together with common intention under s 34 of the same Code. The first and second respondents pleaded guilty and the trial judge sentenced the accused to three years imprisonment from the date of arrest in respect of the offence under s 130G(c). In respect of the offence under s 130P read with s 34, both respondents were sentenced to *two years imprisonment*. On appeal, this court on 21 June 2016 allowed the appeal and set aside the sentence imposed by the High Court. *The accused sentence was enhanced to 15 years imprisonment effective from the date of arrest* (the sentences were to run concurrent).

[29] In *Public Prosecutor v Mohd Anwar bin Azmi & 4 lagi* (Court of Appeal Criminal Appeal No 45–50–46–16 of 2015), the accused persons were charged with an offence under s 130G(a) of the Penal Code. After a full trial, the accused persons were found guilty, convicted and sentenced to *25 years imprisonment*.

[30] We were in agreement with learned deputy that the conduct of the respondent in supporting the IS militant group is a very serious criminal offence. It should reflect the public abhorrence against such crime and warrant a severe punishment. In *Public Prosecutor v Abdul Halim Ishak & Ors* [2013] MLJU 821; [2013] 9 CLJ 559, the court said, inter alia:

> ... denunciation, in the context of sentencing, is achieved by the imposition of a sentence the severity of which makes a statement that *the offence in question is not to be tolerated by society either in general or in a specific instance*. The statement made may be directed at any combination of the public at large, victims, potential offenders and individual offenders. In part its aims are similar to that of deterrence, it has also been seen to be associated with retribution.

CONCLUSION

[31] Having regard to the facts and circumstances of this case, learned deputy and learned counsel's oral and written submission and the established principles on sentencing, in particular the public interest factor where Malaysia is a primary target location for IS terrorists attacks, we cannot compromise with their terrorism activities and the sentence to be imposed must not merely

be a tap on the wrist. We do not agree with the trial judge that the respondent's plea of guilty and the *Abdullah Ang*'s discount should be extended to the respondent and the sentence of five years imprisonment imposed by him was manifestly inadequate.

[32] We, therefore, unanimously set aside the sentence of five years imprisonment imposed by the High Court and accordingly substituted it with an imprisonment term of 12 years with effect from the date of arrest on 27 November 2014.

Order accordingly.

Reported by Dzulqarnain Ab Fatar